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June 11, 2001

VIA HAND DELIVERY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding the original and 4 copies of the Comments of Time Warner Cable.

Thank you for your assistance in this matter. If you have any questions, please call me at 202-326-7945.

Very truly yours,

Henk Brands
Counsel for Time Warner Cable

Enc.

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List A B C D E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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	)	
Carriage of Digital Television	)	
Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	

COMMENTS OF TIME WARNER CABLE

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SUMMARY

I. As Time Warner Cable ("TWC") previously explained, Section 614(b)(4)(B) deprives the Commission of authority to impose a dual-carriage regime. Even if Section 614(b)(4)(B) were merely ambiguous on that point, the Commission would still be powerless to impose a dual-carriage requirement: such a requirement would violate the First Amendment. For a dual-carriage requirement to withstand scrutiny under the First Amendment, it would, at a minimum, have to be narrowly tailored to an important governmental objective. Although the Commission has to date not specified what governmental interest might be furthered by imposing a dual-carriage requirement, a number of interests have been hinted at in this proceeding. But none of those interests can remotely support a dual-carriage requirement.

The interest identified in the *Turner* litigation — assuring the availability of broadcast signals to non-cable viewers — is plainly inapt. That rationale hinges on the assumption that cable operators are not subject to competition, which, particularly in light of the phenomenal growth of DBS, is plainly incorrect. Moreover, to suggest that digital must-carry would benefit non-cable viewers is ironic: the transition to digital broadcasting will hinder, not help, non-cable households in receiving free, over-the-air signals. In any event, the notion that carriage of little-watched digital signals will somehow help safeguard broadcasters' financial viability is entirely implausible. Besides, today's sophisticated input-selection switches allow cable subscribers easy access to digital signals off-air.

A dual-carriage regime also cannot be predicated on a different interest suggested by certain broadcasters: that carriage of digital signals will hasten the transition by encouraging consumers to purchase digital TV sets. An interest in bringing upscale consumers high-resolution television images is simply not sufficiently "important" to justify burdening

protected speech. And a dual-carriage regime will do little to promote this interest: carriage of stations insufficiently popular to secure voluntary carriage will do nothing to encourage the purchase of digital TV sets. Moreover, non-broadcast digital signals (including HDTV content on DVD and non-broadcast programming services) will provide ample encouragement — much more so than carriage of the digital signals of broadcasters, most of which have been unwilling to commit to HDTV.

A separate interest in hastening the return of analog spectrum (so as to generate auction revenue) similarly is deficient. Again, such an interest is simply not sufficiently weighty to justify burdening constitutionally protected speech — particularly because this interest could have been served in a much more direct way by auctioning (instead of giving away) broadcasters' digital spectrum. Besides, compelled carriage of digital signals will do little to serve this interest, for, under 47 U.S.C. § 309(j)(14), cable carriage of digital signals will not in fact hasten spectrum return.

Finally, to the extent broadcasters have suggested that a digital must-carry requirement is necessary to allow cable subscribers to enjoy unique digital broadcast programming, their argument is altogether unhelpful to their cause. A dual-carriage requirement whose stated purpose is to alter the mix of speech available on cable would trigger strict First Amendment scrutiny, which it could not possibly survive.

Even assuming a sensible policy basis for a dual-carriage requirement could be identified in principle, the burden imposed by such a requirement would vastly outweigh any putative benefits. Because most digital signals currently are not carried, the burden imposed would be much more severe than that tolerated in *Turner*. That many cable operators are

upgrading their systems to add bandwidth is not to the contrary. Cable operators will, as a practical matter, have to continue carrying analog, uncompressed signals in the pre-existing part of the cable spectrum, which has long been "channel-locked" on almost all cable systems. Thus, carriage of digital signals in that part of the spectrum would necessarily deprive subscribers of programming that they have come to expect. Carriage in the newly added part of the cable spectrum would be no less burdensome: cable operators are using that portion of the spectrum to provide new and innovative digital services, including cable-modem service, telephony, HDTV programming, and video-on-demand. Compelled carriage of digital broadcast signals would hinder cable operators in providing these innovative services.

II. Even if the Commission were otherwise empowered to impose a dual-carriage requirement, the primary-video limitation of Section 614(b)(3)(A) would stand in the way. Stations are entitled to carriage of only one primary-video transmission. For the foreseeable future, that plainly will be the analog signal.

III. The Commission has also asked for comment on the likely timing and manner of the transition. TWC shares the consensus view that it is unlikely that the transition will be concluded in 2006. TWC believes that this is due not to any lack of digital signals, but, rather, to the large price differential between analog and digital TV sets. TWC believes that it would be inappropriate to force consumers to embrace digital broadcasting before they are ready to do so.

IV. Contrary to the Commission's previous conclusion, program-related material outside the primary-video transmission of a digital signal is not entitled to carriage at all. Assuming that the Commission had authority to compel carriage of any such material, it

should use that authority sparingly, and should certainly not require carriage of more than the material listed in the *Order* (closed-captioning, V-chip, SID, and PSIP data).

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COMMENTS OF
TIME WARNER CABLE

Time Warner Cable ("TWC") submits these comments in response to the Commission's First Report and Order and Further Notice of Proposed Rulemaking in this proceeding ("the *Order*").[1] In the *Order*, the Commission correctly concluded, based on a voluminous record, that a dual-carriage requirement (*i.e.*, a requirement that cable operators carry both analog and digital broadcast television signals during the transition from analog to digital broadcasting) cannot withstand First Amendment scrutiny. *See Order* ¶¶ 3, 112. We therefore applaud the thrust of the *Order*.

The *Order* nevertheless offered broadcasters another (third) opportunity to satisfy the heavy burden that they would have to carry to justify a dual-carriage regime.[2] As explained

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[1] *See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 (2001).

[2] Broadcasters had previously been afforded such opportunities in *Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, Notice of Proposed Rule Making, 13 FCC Rcd 15092 (1998) ("*NPRM*"), and in *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast*

below, broadcasters can no more meet that burden now than they could before. It is impossible to formulate a policy rationale for a dual-carriage requirement that might survive even review for reasoned decision making under the Administrative Procedure Act. Thus, it is altogether impossible to formulate a governmental interest sufficiently weighty for a dual-carriage requirement to survive scrutiny under the First Amendment. In light of these constitutional concerns, the Commission may not interpret Section 614(b)(4)(B) to authorize the imposition of a dual-carriage regime. Moreover, even if Section 614(b)(4)(B) would (considered alone) in principle permit the Commission to impose a dual-carriage regime, the "primary video" provision of Section 614(b)(3)(A) would independently bar it.

The *Order* also seeks comment on other issues, including the timing of the transition from analog to digital broadcasting and the scope of a putative obligation to carry program-related material contained within digital signals. TWC firmly believes that the pace of the transition should be left to the market, and that further government intervention at this point would do more harm than good. Moreover, TWC submits that program-related material that is not part of the primary video transmission of a digital signal is not entitled to carriage at all. At a minimum, the Commission should interpret the term "program-related" narrowly in the digital context, in keeping with its limited scope in the analog context.

Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, 10 FCC Rcd 10540 (1995).

I. A DUAL-CARRIAGE REQUIREMENT WOULD ARBITRARILY AND IMPERMISSIBLY BURDEN PROTECTED SPEECH.

As TWC has already explained (and will not reiterate here), Section 614(b)(4)(B), in conjunction with other provisions, *forbids* digital must-carry during the transition. *See* Comments of Time Warner Cable at 31-47, CS Docket No. 98-120 (FCC filed Oct. 13, 1998) ("TWC 1998 Comments"); Reply Comments of Time Warner Cable at 22-27, CS Docket No. 98-120 (FCC filed Dec. 22, 1998) ("TWC 1998 Reply Comments"); Time Warner Cable's Opposition to Petitions for Reconsideration at 3-4, CS Docket No 98-120 (FCC filed May 25, 2001) ("TWC Opp."). Even if TWC were somehow wrong on that point, the Commission was surely correct in rejecting the notion that the 1992 Cable Act *requires* dual carriage during the transition. *See Order* ¶ 14; *see also* TWC Opp. at 4-6. Plainly, the Commission was correct in saying that, at best, the statute is ambiguous and therefore, at the very most, could *permit* (but not require) it to impose a dual-carriage regime. *See Order* ¶ 14.

Given the Commission's finding of ambiguity, however, constitutional considerations bar imposing a dual-carriage regime. As the D.C. Circuit recently explained, "'[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'" *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) ("*Time Warner II*") (quoting *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 121 S. Ct. 675, 683 (2001)).[3] In the

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[3]*See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."); *see also Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the

absence of a clear authorization from Congress, therefore, the Commission must avoid adopting rules whose constitutional validity is even in doubt. Here, there is more than mere doubt. As shown below, imposition of a dual-carriage regime would unquestionably be in flat violation of the First Amendment.[4]

A. To This Day, No Rationale Has Been Formulated That Might Justify a Dual-Carriage Requirement.

It is by now indisputable that cable operators and cable-programming services engage in constitutionally protected speech. *See, e.g., Time Warner II*, 240 F.3d at 1129. Must-carry requirements place a heavy burden on that speech by interfering with cable operators' editorial discretion and by impeding cable-programming services' efforts to obtain carriage. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636-37, 643-45 (1994) ("*Turner I*"). At a minimum, must-carry requirements are therefore subject to "intermediate" First Amendment scrutiny. *See id.* at 661-62; *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"); *Order* ¶ 114. A must-carry rule can survive such review only

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interpretation which avoids the constitutional issue."); *Jones v. United States*, 529 U.S. 848, 851 (2000) ("constitutionally doubtful constructions should be avoided where possible"). Indeed, even if the statute unambiguously required a dual-carriage regime, the Commission would still be free to rely on First Amendment considerations in declining to impose such a regime. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (rule that agencies may not query "the constitutionality of congressional enactments . . . is not mandatory") (internal quotation marks and citation omitted); *see also WXTV License Partnership, G.P.*, Order on Reconsideration, 15 FCC Rcd 3308, ¶ 30 (2000) (citing *Thunder Basin*).

[4]Apart from violating the First Amendment, a digital must-carry requirement would also violate the Fifth Amendment's prohibition on taking private property without just compensation, as TWC demonstrated (and no commenter contested) in response to the *NPRM*. *See* TWC 1998 Comments at 26-30; TWC 1998 Reply Comments at 15.

if "it furthers an important or substantial governmental interest," and if the burden imposed is "no greater than is essential to the furtherance of that interest." *Turner I*, 512 U.S. at 662 (internal quotation marks omitted); *see Turner II*, 520 U.S. at 189.

The analog must-carry regime at issue in *Turner* was supported by elaborate congressional statements of purpose and findings of fact, which were based on hearings conducted over a span of three years and evidence concerning events going back as far as eight years. *See Turner I*, 512 U.S. at 632-33. Even though the Supreme Court accorded deference to those congressional findings, it still sustained analog must-carry only narrowly — after a vast record was created on remand, in a five-to-four decision, and without a single majority opinion. *See Turner II*, 520 U.S. 180. Any digital must-carry requirements promulgated by the Commission will be subject to even more searching review, for the Commission's factual determinations are not entitled to the deference afforded to congressional findings. *See id.* at 195-96. Thus, the Commission may not impose any must-carry burden unless it first compiles "a record that convincingly shows a problem to exist." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) ("*HBO*") (per curiam).

Because Congress never proposed any dual-carriage regime, there is no congressional statement of purpose setting out the governmental interests that such a requirement might serve. Before any digital must-carry regime could even be given serious consideration, it would therefore be incumbent on the Commission to identify with some specificity what objectives it proposes to pursue by doing so. The *Order* fails to identify any such important governmental interest with specificity, even though the Commission has now *twice* been asked

to do so.[5] Rather, the Commission apparently again asks commenters to formulate a rationale for it. *See Order* ¶ 114. Remarkably, then, the speech-burdening restriction at issue in this proceeding is of such questionable utility that, even after years of discussion, it is still in search of a plausible justification. That alone is sufficient reason to reject it.

B. None of The Rationales That Have Been Hinted at in This Proceeding Can Sustain a Dual-Carriage Requirement.

Although the Commission has failed to endorse any particular rationale for a dual-carriage regime, several have been hinted at. None of the rationales suggested, however, could possibly sustain a dual-carriage requirement.

1. The Rationale Advanced in *Turner* Cannot Justify a Dual-Carriage Requirement.

Certain portions of the *Order* could be read as suggesting that a dual-carriage regime might be justifiable on the strength of the rationale advanced in the *Turner* litigation. *See, e.g., Order* ¶ 113. That rationale, however, cannot support a requirement to carry digital signals.

a. In the *Turner* litigation, the Government defended the must-carry requirements of the 1992 Cable Act by pointing to "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of

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[5] *See NPRM* ¶ 3 (noting comments filed in MM Docket No. 87-268); TWC 1998 Comments at 14 ("Until the Commission identifies the interests served, commenters cannot meaningfully analyze even whether must-carry rules would be content-based or otherwise subject to strict scrutiny under the First Amendment."). Without knowing what policy objectives might be served by a dual-carriage regime, affected parties' ability to provide meaningful comment is plainly impaired. *See, e.g., MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995); *HBO*, 567 F.2d at 36.

information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Turner I*, 512 U.S. at 662. Although the *Turner* Court, in the end, upheld analog must-carry, the Court — contrary to the suggestion in the *Order* (¶ 113) — did *not* imply that must-carry obligations may be imposed whenever they promote these three nebulous interests in some abstract sense. Rather, the Court determined that must-carry obligations may be imposed only insofar as they serve those interests in a much more palpable and specific manner. In particular, the Court upheld analog must-carry only because it found that, in the end, the three abstract interests collapsed into an "overriding objective" to "preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646; *see also id.* at 664-65 (plurality).

The Supreme Court agreed that, as a legal matter, this objective qualified as "important" for purposes of intermediate scrutiny. *See id.* at 662-63. But abstract importance alone was insufficient: the Court required the Government to show that access to free, over-the-air television was in actual jeopardy. *See id.* at 664-65 (plurality). As Justice Kennedy's lead opinion put it: "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664 (internal quotation marks and citation omitted).

Attempting to meet this burden, the Government asserted that the problem sought to be cured was a threat of economic injury to free, over-the-air television resulting from cable operators' refusal to carry broadcast signals. The theory was that cable operators had an

economic incentive to drop broadcast signals to make room for cable-programming services because cable operators can sell advertising on cable-programming services but not on broadcast programming. *See id.* at 633, 646. Because cable operators supposedly had no competition, the theory ran, they could drop broadcast signals at will, without suffering any subscriber loss. *See id.* at 633. The theory concluded that television viewers usually discontinue reception of over-the-air stations after subscribing to cable; that dropped stations would therefore see their audience (and thus their advertising revenue) shrink; and that, in the end, consumers unable or unwilling to subscribe to cable might be left with fewer (or less well-financed) free, over-the-air television signals to watch. *See id.* at 633-34, 646-47.

Though the Court agreed that Congress had enacted the must-carry statute on that reasoning, *see id.*, the Court required a factual showing "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," *id.* at 664-65. This, the Court recognized, in turn depended "on two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 666 (plurality). Because there was insufficient evidence to support these propositions, the Court remanded for further development of the record. *See id.* at 667-68 (plurality).

After remand, the Court narrowly sustained the statute by a five-to-four vote. *See Turner II*, 520 U.S. 180. In determining whether the problem sought to be addressed was "real," the Court felt constrained to accord deference to congressional findings. *See id.* at 195-96. Thus, the Court phrased the question presented as not whether the asserted problem

was real, but merely whether Congress could have found that it was real by "draw[ing] reasonable inferences based on substantial evidence." *Id.* at 195 (internal quotation marks omitted). The Court found that standard satisfied, holding that the record developed on remand contained substantial evidence to support predictions that, without must-carry, cable operators would drop substantial numbers of broadcast stations, *see id.* at 196-208 (plurality); *id.* at 226 (Breyer, J., concurring in part), thereby causing broadcasters significant injury, *see id.* at 208-13.

b. The *Turner* rationale cannot, under present conditions, support any additional must-carry obligations. The *Turner* rationale vitally depended on the assertion that cable was not subject to effective competition from other multichannel video programming distributors ("MVPDs"). *See, e.g., Turner I*, 512 U.S. at 656 (characterizing cable as a "bottleneck"); *id.* at 661 ("the bottleneck monopoly power exercised by cable operators"). It was well recognized that cable's supposed ability to harm broadcasters depended on the degree to which it was subject to competition. *See id.* at 633. And, as Justice Breyer acknowledged, the putative absence of competition might be "less" true "in the future." *Turner II*, 520 U.S. at 227.

Since the *Turner* decisions, competition from other MVPDs, particularly DBS, has grown explosively. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132, FCC 01-1, 2001 WL 12938, ¶¶ 13-14, 60-82 (rel. Jan. 8, 2001) (*"Seventh Annual Report"*). DBS's share of MVPD subscribers has grown from zero to more than 15 percent in just a few years, and DBS signs up the vast majority of new MVPD customers. *See id.* ¶ 14 & App. C, Table C-1;

see also Sky Report, National DTH Count (counting almost 16 million DBS subscribers in April 2001), *at* http://www.skyreport.com/dth_us.htm. Particularly now that DBS is able to provide local broadcast signals, *see* 17 U.S.C. § 122, DBS has become "a viable alternative to cable in all parts of the country," *Amendment of Section 73.658(g) of the Commission's Rules — the Dual Network Rule*, Report and Order, MM Docket No. 00-108, FCC 01-133, 2001 WL 506224, ¶ 13 (rel. May 15, 2001).

In light of DBS's proven ability to compete with cable, it is simply implausible that cable operators could profitably act on any supposedly anticompetitive incentive. If a cable operator, intent on increasing its advertising revenue by replacing a broadcast signal with a cable-programming service, impaired the attractiveness of its multichannel video package, its action would prove plainly unrewarding. *See Time Warner II*, 240 F.3d at 1133-34; *see also id.* at 1138-39. By taking this course, the operator would alienate subscribers, who can at any time switch to DBS. The loss in subscription revenues would offset any putative increase in advertising revenue. At a minimum, then, the Commission should closely scrutinize the effect of competition from alternative MVPDs before imposing entirely new must-carry burdens. *See id.* at 1133-34.

c. Regardless of the impact of competition, a rationale relating to "access to free television programming for the 40 percent of Americans without cable" (*Turner I*, 512 U.S. at 646) cannot justify digital must-carry rules. At the outset, the special analog-to-digital transition context precludes any reliance on that rationale. The transition to digital broadcasting will ultimately require viewers to purchase expensive new TV sets or converters, which non-cable households presumably are least able to afford. Moreover, Congress has

decreed that, once 85 percent of television households in a local market have either subscribed to an MVPD carrying a requisite number of digital broadcast signals or have purchased the technology necessary to access digital signals off-air, the remaining 15 percent of households (unable or unwilling to replace their analog sets) may be left stranded without any broadcast signals. *See* 47 U.S.C. § 309(j)(14)(B)(iii); *see also infra*, pp. 15-18. Thus, the transition to digital television will hinder, not help, access to free, over-the-air television. Having in that sense sacrificed and abandoned the interests of non-cable households, dual-carriage advocates cannot credibly march under the banner of free, over-the-air television.[6]

Moreover, there is no factual predicate for a rationale relating to "access to free television programming for the 40 percent of Americans without cable." If "the viability of broadcast television" was ever in danger, *Turner I*, 512 U.S. at 666 (plurality), analog must-carry has undoubtedly secured it. Because cable operators will continue to carry analog signals during the transition period, broadcasters' audiences will not be diverted even if cable operators decline to carry digital broadcast signals. Thus, broadcasters will be able to reach the same number of cable subscribers (and to garner the same amount of advertising dollars) whether or not their digital signals are carried on cable. To date, broadcasters have pointed to no evidence that, without digital must-carry, "station revenues would . . . decline" to such a

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[6]*See, e.g.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985) ("If, in fact, the FCC has repudiated the . . . assumptions that underlie the must-carry rules, the suggestion that they serve an important governmental interest (or any interest at all) would be wholly unconvincing."); *HBO*, 567 F.2d at 40 (Commission may not rely on interest to uphold one measure where other FCC measure directly undercuts the same interest); *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 929-32 (E.D. Va. 1993) (same), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded on other grounds*, 516 U.S. 415 (1996) (per curiam).

degree that "the quality of over-the-air programming . . . would . . . suffer." *Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part).

That very notion is preposterous. Digital must-carry could help safeguard the availability of over-the-air signals only if there were some reason to believe that cable subscribers will altogether stop watching analog signals on cable (say, because they prefer to watch the digital signals that *are* carried, voluntarily) and that lack of digital carriage will thus cause a meaningful drop in advertising revenue for stations whose digital signals are not being carried. There is, of course, absolutely no sign that cable subscribers will overwhelmingly stop watching analog signals any time soon. To the contrary, insofar as digital signals are being carried on cable, their audience is minute — which, ironically, is why some are arguing that the Commission should impose a dual-carriage regime to encourage cable subscribers to view digital signals in the first place. *See infra*, pp. 13-15.

Even if cable subscribers overwhelmingly began to watch digital signals in preference over analog ones, cable still could not possibly divert any broadcaster's audience: input-selection switches would make it easy for cable subscribers to receive digital signals off-air. At the time the 1992 Cable Act was passed, available input-selection switches were cumbersome, technically flawed devices that were rarely used. *See Turner II*, 520 U.S. at 220-21. That is a far cry from the sophisticated electronic, remote-controlled, input-selection switches built into digital TV sets today. *See* TWC 1998 Comments, Large Aff.[7] Thus,

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[7]As this Commission previously acknowledged, concerns about the efficacy of A/B switches "may become moot if television receivers begin to be manufactured with switching or interface devices built in." *See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, Report and Order, 1

digital TV set owners will find it easy and convenient to use an antenna to receive off-air digital signals. *See id.* Any prediction that cable-subscribing owners of digital sets will not view digital signals off-air is therefore untenable.

2. The "Encourage the Purchase of Digital Sets" Rationale Cannot Justify a Dual-Carriage Requirement.

It has also been suggested that digital must-carry rules may promote "a successful transition to digital television." *Order* ¶ 112. This rationale appears to assume that, unless cable operators are required to carry digital signals during the transition period, consumers will have no digital signals to watch; that they will thus be discouraged from purchasing expensive digital TV sets; that this will deter broadcasters from investing in digital transmitting equipment and programming; and that this will further discourage consumers from purchasing digital TV sets.

The Commission plainly is not serious about this rationale, for the *Order* effectively repudiates it. The *Order* does so by empowering broadcasters to force cable carriage of their digital signals in *analog* format — thereby sacrificing whatever set-purchasing encouragement might result from carriage of these stations' signals. *See Order* ¶ 74 ("digital-to-analog conversion will not provide an impetus for cable subscribers to purchase digital television sets"). This repudiation is unsurprising, for the rationale has serious flaws even beyond those it shares with the *Turner* rationale.

First, it is fundamentally implausible that, even considered in the abstract, an interest in bringing upscale consumers high-resolution television images is "important" for purposes of

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FCC Rcd 864, ¶ 167 (1986).

intermediate First Amendment scrutiny. Although the interest may be legitimate, it is simply not sufficiently weighty to justify burdening constitutionally protected speech. *See HBO*, 567 F.2d at 34 (interest in ensuring that pay TV services like HBO would play "'supplemental' role" vis-a-vis broadcast television — which the Commission advanced to justify rule prohibiting advertising on pay cable services — was not "important" for purposes of *O'Brien* analysis); *id.* at 50 (expressing doubt that interest in preventing delay of commercial television broadcast of motion pictures was "important").

Second, the prediction that consumers' purchases of digital TV sets will stand or fall with a dual-carriage requirement assumes that cable operators would carry no digital signals at all without such a requirement. That assumption is clearly untenable: market forces will ensure carriage of digital signals that consumers find desirable. As the Commission has recognized, TWC has already executed retransmission-consent agreements "with all four major networks, some network affiliate owners, as well as a group of public broadcasters." *Order* ¶ 129 (footnote omitted). And carriage of stations that are not sufficiently popular to obtain voluntary carriage is unlikely to encourage any consumers to buy a digital TV set. For example, it is implausible that even a single consumer would decline to purchase a digital TV set on the ground that a particular home-shopping station is available only in analog, not digital, format.

Finally, a carriage requirement is simply unnecessary to encourage the purchase of digital TV sets: non-broadcast digital signals provide ample encouragement. Aside from

HDTV content available on DVD,[8] programming services like HBO, Showtime, Discovery Channel, A&E, and MSG are already providing HDTV feeds. HDTV programming from those sources (which neither have received government spectrum subsidies nor count on government-compelled cable carriage to guarantee a return on their digital investments) will encourage the purchase of digital sets much more strongly than carriage of broadcast signals — most of which are not even broadcasting in HDTV format.[9]

3. The "Hasten the Return of Analog Spectrum" Rationale Cannot Justify a Dual-Carriage Requirement.

It has also been suggested that a dual-carriage requirement might be warranted to encourage broadcasters to return their analog spectrum, with the ultimate purpose of generating auction revenue. *See Order* ¶ 112. The reasoning appears to be that, under 47 U.S.C. § 309(j)(14), cable carriage of digital signals affects the date by which analog spectrum can be recaptured. Under Section 309(j)(14)(B), the notion appears to be, the Commission

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[8] *See* Electronics Times, Jan. 29, 2001, at 26 ("To date, some 750,000 high-definition TVs (HDTVs) have been sold at upwards of $2500 but few have digital tuners. Most consumers are apparently using [HDTV] sets to watch DVDs or digital satellite and only a small percentage have paid the additional $1000 to upgrade to terrestrial digital."); Letter from W. Allan McCollough, President & CEO, Circuit City Stores, Inc., to Commissioner Susan Ness, FCC, at 1 (Dec. 28, 1999) ("Although the major networks are making some efforts in the areas of prime time and sports programming, the availability of compelling movie content is essential. We are encouraged that both satellite and cable operators have indicated an interest in devoting a portion of their bandwidth for delivery of premium movie channels as well as some pay per view movie content.").

[9] *See* Harriet Winslow, *The ABCs of Modern TVs; Sorting the Options Is No Longer as Simple as 1, 2,* 3, Wash. Post, May 13, 2001, at Y8 ("Cable networks such as HBO, which has 24 hours of HDTV movies available by satellite, are a strong selling point for the new TVs."); Electronics Times, Jan. 29, 2001, at 26 ("[V]ery few of the 172 TV stations broadcasting in digital are offering HDTV.").

must allow broadcasters to keep analog spectrum even beyond 2006 if, in a particular market, fewer than 85 percent of the television households "subscribe to a multichannel video programming distributor . . . that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market." 47 U.S.C. § 309(j)(14)(B)(iii)(I). Thus, the theory appears to run, more digital carriage means faster recapture.

Generating funds for the federal treasury, however, is simply not a sufficiently important governmental interest to justify suppressing protected First Amendment speech. *See supra*, pp. 13-14. That is particularly true here, because a much simpler, less indirect, way of promoting the interest was available: the Government could simply have auctioned the spectrum earmarked for digital broadcasting. Having given that spectrum (valued at $70 billion[10]) away for free, no one could now credibly contend that generating auction revenue is an important First Amendment objective. *See supra*, p.11 n.6; *see also Turner Broadcasting v. FCC*, 910 F. Supp. 734, 774 n.19 (D.D.C. 1995) (Williams, J., dissenting) ("Congress cannot invoke a problem created by [Congress itself] as a justification for the remedy."), *aff'd*, 520 U.S. 180 (1997).

Even assuming that this interest could qualify as "important" for purposes of intermediate First Amendment scrutiny, it is not at all clear that requiring carriage of digital signals during the transition will result in faster spectrum return. Section 309(j)(14) prohibits

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[10]*See* William E. Kennard, Chairman, FCC, *What Does $70 Billion Buy You Anyway?*, Remarks Before the Museum of Television and Radio (Oct. 10, 2000), *available at* http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html.

the Commission from extending analog broadcast licenses beyond 2006, with three exceptions. 47 U.S.C. § 309(j)(14)(A). The exception described above is set forth in Section 309(j)(14)(B), which requires extension of the deadline if at least 15 percent of TV households in a market (1) do not subscribe to an MVPD carrying the digital signal of each digital broadcaster in the market; *and* (2) do not have a digital TV receiver or a digital-to-analog converter. *Id.* § 309(j)(14)(B)(iii)(I)-(II).[11] The Commission suggests that the conjunctive "and" might suggest that *both* conditions must be met before an extension may be authorized. *Order* ¶ 117. On that reading, a broadcaster would have to surrender its analog license if more than 85 percent of television households in a market subscribe to an MVPD carrying the requisite digital signals — even if none of those households has a digital TV set or digital-to-analog converter by which one can actually view those signals.[12]

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[11]Section 309(j)(14)(B)(iii) requires the Commission to extend the deadline in a given market if:

> 15 percent or more of the television households in such market —
> (I) do not subscribe to a multichannel video programming distributor . . . that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and
> (II) do not have either —
> (a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or
> (b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

47 U.S.C. § 309(j)(14)(B)(iii).

[12]Plainly, carriage of digital signals in converted-to-analog format would not suffice for purposes of Section 309(j)(14)(B)(iii). Converted signals clearly are not "*digital* television service programming channels." 47 U.S.C. § 309(j)(14)(B)(iii)(I) (emphasis added).

It is far from clear that Congress actually intended that anomalous result. In this undeniably complex provision (containing double negatives and exceptions to exceptions), Congress likely meant to say "or" instead of "and," which would make surrender of analog spectrum dependent not only on MVPD *carriage* of digital signals but also on subscribers' ability to *view* those signals. The Conference Report confirms that this was the operative assumption: "[F]or purposes of the inquiry under this section, a television household must *receive* at least one programming signal from each local television station broadcasting a digital television service signal in order not to be counted toward the 15 percent threshold." H.R. Conf. Rep. No. 105-217, at 577 (1997) (emphasis added).[13]

In any event, even if Section 309(j)(14)(B)(iii) were applied as suggested, increasing digital cable carriage would not automatically result in more expeditious return of analog spectrum. MVPD penetration in most markets is less than 85 percent. *See Seventh Annual Report* ¶ 6 & App. C., Table C-1. Thus, it is doubtful that forced carriage of digital signals would prevent the exception to the spectrum-return deadline from becoming applicable in many instances.

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[13]*See also* H.R. Conf. Rep. No. 105-217, at 576-77 (explaining that purpose of extension was "to ensure that a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007"); *id.* at 576 (explaining that House bill had based extension on number of households that "continue to rely exclusively on an over-the-air, analog broadcast signal"); *id.* (explaining that Senate amendment had based extension on percentage of households with "access to digital television signals, either by direct off-air reception or by other means").

4. Any Rationale Predicated on a Supposed Need to Provide Cable Subscribers with Digital Signals Is Impermissible.

Finally, some broadcasters in recent filings have suggested that a dual-carriage regime should be imposed on the ground that the Commission will do a better job than cable operators in deciding what cable subscribers want to watch. *See, e.g.*, Paxson Communications Corp. Opposition to Petition for Reconsideration at 2, CS Docket No. 98-120 (FCC filed May 25, 2001); Guenter Marksteiner (WHDT-DT) Consolidated Opposition to Petition for Reconsideration at 16, CS Docket No. 98-120 (FCC filed May 25, 2001). Because digital broadcast signals provide a unique source of programming, the theory runs, the Commission should ensure that cable subscribers are able to enjoy it.

As to this proposed justification, we can be brief. Plainly, any restriction on speech is content-based when its avowed purpose is to alter speech content. *See, e.g., Turner I*, 512 U.S. at 642; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000) ("*Time Warner I*"), *cert. denied*, 121 S. Ct. 1167 (2001). Thus, the Commission simply may not adopt any regulations whose stated justification is to "improve" the mix of speech available on cable. *See Turner I*, 512 U.S. at 652 (stating that strict scrutiny would have been due if Congress had enacted the must-carry measure in an "effort to exercise content control over what subscribers view on cable television"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995) ("[t]he Government's interest in *Turner*

Broadcasting was not the alteration of speech").[14] And no one could credibly argue that a dual-carriage regime could survive review that exacting.

C. Even if a Dual-Carriage Requirement Could Plausibly Be Said To Further Any Important Governmental Interest, Any Putative Benefits Would Be Vastly Outweighed by the Burdens Imposed.

Even if mandatory digital carriage during the transition could somehow be said to further any sensible Commission policy, its imposition must be shown not to "burden substantially more speech than is necessary to further [that] interest[]." *Turner I*, 512 U.S. at 662 (internal quotation marks omitted); *see Quincy*, 768 F.2d at 1461 (Commission has an "affirmative obligation to show the requisite fit between means and ends") (internal quotation marks omitted); *id.* at 1463 ("the government must affirmatively demonstrate that the regulation is narrowly tailored to serve a substantial interest"). In the case of a dual-carriage regime, no such showing can be made.

The burden imposed by a dual-carriage requirement would dwarf that tolerated in *Turner*. When the requirement that cable operators carry analog broadcast signals went into effect in 1993, cable operators were already carrying the vast majority of analog signals voluntarily. Thus, the Supreme Court determined that, although broadcast signals occupied more than 35,000 channels at the time, only 5880 channels involved signals that would not

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[14] *See also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14, 20 (plurality opinion) ("the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not — and does not purport to be — content neutral"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (governmental attempt to restrict the voices of some in order to "'enhance the relative voices'" of less influential speakers "contradicts basic tenets of First Amendment jurisprudence"); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

have been carried otherwise, that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry," and that "94.5 percent" of all cable systems had "not had to drop any programming in order to fulfill their must-carry obligations." *Turner II*, 520 U.S. at 214. The Court concluded from this that must-carry imposed only a modest burden. *See id.*

That reasoning has no application in the digital context. Though voluntary carriage is increasing as digital stations sign on the air, *see* TWC's Responses to Questions on Cable System Capacity and Retransmission-Consent Agreements at 6 (May 25, 2001) ("TWC Survey Response"), carriage of digital signals currently does not approach the level of analog signals documented in *Turner*. Imposing a digital must-carry requirement would thus dramatically increase the number of broadcast signals cable operators would be required to carry. If, absent legal compulsion, cable operators would not initially carry that number of digital signals, the net "burden of must-carry" would therefore vastly increase.

The fact that many cable operators in recent years have expanded the bandwidth of their cable systems from 550 MHz to 750 MHz does not alter this conclusion. The pre-existing part of the cable spectrum (the portion below 550 MHz) is generally used as it always has been: for analog signals, with each signal occupying 6 MHz of bandwidth. In most cable systems, this part of the spectrum has long been "channel-locked." *See* TWC Survey Response at 2. Cable operators could not increase channel capacity in this part of the spectrum by converting it to digital transmission (thereby permitting compression). For the foreseeable future, a sizable number of subscribers is expected to subscribe only to analog programming packages, and will be unwilling to acquire the digital set-top boxes that are necessary to view

digital signals. *See id.* Adding digital broadcast signals to the lower 550 MHz therefore would almost always mean depriving analog cable subscribers of a cable-programming service that they have come to expect. It would truly be ironic if consumers were to see unique cable-programming services disappear, only to be replaced by duplicative digital broadcast signals that they cannot even view.

Forced carriage of digital signals in the part of the cable spectrum above 550 MHz would similarly burden cable operators, cable programmers, and cable subscribers alike. Cable operators use this spectrum to provide a variety of innovative digital services, thereby furthering a fundamental communications policy objective. *See* 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public."). An increasing portion of this spectrum is being used for cable-modem service and telephony — uses strongly favored by this Commission.[15] Moreover, cable operators provide HDTV programming from not only broadcasters but also from non-broadcast services. *See* TWC Survey Response at 4. In addition, digital spectrum is used for programming services not available on analog cable as well as for pay-per-view programming. *See id.* at 5.

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[15] *See, e.g.*, *Powell Sees Limited Gov't Role for Rural Broadband*, Comm. Daily, June 6, 2001, at 1 ("Powell . . . emphasized need . . . to foster innovation and investment in advanced infrastructure and experimentation in technologies such as IP telephony") (internal quotation marks omitted); Patrick Ross, *FCC Takes Market Turn with Powell*, CNET News.com (Feb. 6, 2001) (quoting Chairman Powell as saying that "the success of cable-modem services forced a decade-old DSL (digital subscriber line) technology onto the market," and "unleashed broadband"), *at* http://news.cnet.com/news/0-1004-200-4731304.html?tag=rltdnws; *Panel I of a Hearing of the Senate Commerce, Science & Transportation Committee: Nomination of Michael Powell to Be Chairman of the Federal Communications Commission*, Fed. News Service (May 17, 2001) (expressing intent to "make sure that cable companies continue to have incentive focused on the data side").

And some of TWC's systems have recently begun offering video-on-demand, an offering that is expected to be rolled out nationwide in the near future and will likely consume considerable amounts of bandwidth. *See id.*

If these innovative services were to be pre-empted by digital must-carry signals, consumers would unquestionably be harmed. At the same time, cable operators' incentive to invest in further upgrades would be blunted if they knew that any spectrum additions would have to be reserved for use as a free distribution outlet for a set of government-favored programmers. Nor is there any apparent consumer benefit. Being able to view largely duplicative broadcast programming in digital rather than analog format would provide viewers no benefit at all — particularly because most broadcasters to date have declined to commit to broadcasting HDTV programming.[16] And, as already explained, owners of digital receivers, which incorporate sophisticated input-selection switches, will, in any event, be able to access digital signals off-air with ease. *See supra*, pp. 12-13.

In sum, any putative benefits of carriage of digital signals would pale in comparison to the vast harms it would cause. It would therefore burden far more speech than necessary to further whatever governmental interest might be identified. That is all the more so because the burden might well last for a decade or more. There is a consensus that the transition to digital

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[16]*See Order* ¶ 120; *see also* Dawn C. Chmielewski, *HDTV Installation Can Be a Real Turnoff*, Personal Tech., Seattle Times, May 13, 2001 ("There's a simple explanation for this obvious lack of enthusiasm [for digital television]: scant high-definition programming. Both NBC's and ABC's broadcasts appear to be the same signal, converted for digital transmission. The subtle differences in clarity and color sharpness were noticeable only when I switched between digital channels and cable television to point out the contrast.").

broadcasting will stretch well past the tentative 2006 deadline.[17] Although the Commission has proposed imposing a must-carry requirement of limited duration, *see Order* ¶ 118, that would not appreciably lighten the burden. Plainly, the impact would be just as severe while the requirement would be in effect. And, once in effect, the Commission would no doubt face strong pressure to prolong the dual-carriage requirement as the transition drags on.

II. THE "PRIMARY VIDEO" LIMITATION PRECLUDES ANY DUAL-CARRIAGE REQUIREMENT.

Section 614(b)(3)(A) requires carriage only of "the primary video . . . transmission of each of the local commercial television stations carried on the cable system" pursuant to a must-carry obligation. 47 U.S.C. § 534(b)(3)(A); *see also id.* § 535(g)(1). In the *Order*, the Commission correctly determined that, when a broadcaster uses its digital spectrum to broadcast multiple SDTV signals, only one of those signals can qualify as its "primary video . . . transmission." *See Order* ¶ 57. Because the Commission, in the *Order*, declined to impose a dual-carriage regime, it had no occasion to address the next logical question: whether, when a broadcaster has both a digital and an analog signal, only one of those signals can qualify as the "primary video" transmission. 47 U.S.C. § 534(b)(3)(A).[18] If the Commission somehow were to find that it has authority to impose a dual-carriage regime, it could no longer avoid the primary-video question.

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[17]*See, e.g.*, NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 2-3, CS Docket No. 98-120 (FCC filed Apr. 25, 2001).

[18]As the Commission recognizes, this precise issue was raised in the 1998 comments of TWC and others. *See Order* ¶ 52 & n.152; *see also* TWC 1998 Comments at 48-52.

It is plain that the analog and digital signals broadcast by a given television licensee emanate from the same broadcast television "station[]." 47 U.S.C. § 534(b)(3)(A). As TWC explained in its initial 1998 comments, the Commission has long adhered to that view,[19] and the *Order* confirmed it. For example, it defined "dual carriage" as the "simultaneous carriage of both a television station's digital and analog signals." *Order* ¶ 2. Indeed, it emphasized that dual-carriage would involve "two signals of the same station." *Id.* ¶ 69. And it amended the rule defining "television station" to refer to "a television broadcast station operating on [digital and analog] channels." 47 C.F.R. § 76.5(b).

For the foreseeable future, a broadcaster's analog signal will plainly continue to be its "primary video . . . transmission" and, thus, the only signal entitled to mandatory carriage. Thus, any requirement that a cable operator carry both a primary analog and a secondary digital signal would directly contravene the plain language of Section 614(b)(3)(A). And even if the Commission were somehow to find Section 614(b)(3)(A) ambiguous on this point, any tie would have to be resolved against carriage. *See supra*, pp. 3-4.[20]

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[19]*See* TWC 1998 Comments at 49-50; *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd 6860, ¶ 53 (1998) (digital television allotments "do not involve new stations"); *id.* ¶ 73 (referring to broadcasters transmitting both digital and analog signals as "stations with both channels").

[20]Moreover, even if a broadcaster with analog and digital signals constituted two separate "stations," the same result would still follow. Section 614(b)(5) provides that "a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system." 47 U.S.C. § 534(b)(5). If a single broadcaster's analog and digital signals constitute separate "stations," Section 614(b)(5) makes plain that only one of them is entitled to carriage if the two are duplicative. *See generally* TWC 1998 Reply Comments at 29-31. This Commission has determined that "substantial duplication" occurs

III. THE PACE OF THE ANALOG-TO-DIGITAL TRANSITION SHOULD BE LEFT TO THE MARKETPLACE.

The Commission has requested commenters to predict how and when the transition from analog to digital broadcasting will be completed. *See Order* ¶ 117. TWC believes that digital television constitutes an exciting technological development and is anxious to bring it to consumers who desire it. As detailed above, TWC already carries numerous digital signals of broadcasters and cable-programming services, and carriage of digital programming will likely only increase in the future. At the same time, however, TWC is in agreement with the consensus view that the 2006 deadline could be met only if penetration of digital receivers suddenly began to grow at rates significantly higher than any other consumer product in history, including color TV. Thus, TWC is concerned that, if the Commission were to impose a requirement that cable operators carry digital broadcast signals during the transition, that requirement might burden protected speech well beyond 2006.

Moreover, TWC does not believe that the availability of programming on cable is retarding the transition. Cable operators, who face ever-increasing competition from DBS and other MVPDs, have an obvious incentive to carry programming that subscribers find attractive. Thus, cable operators will bring consumers digital signals if they value such signals more highly than other signals. Indeed, TWC is increasingly making available the HDTV signals of popular broadcast and non-broadcast programming services. *See* TWC Survey Response at 6. Just as in the case of analog must-carry, the main winners of a digital must-

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when two stations broadcast the same programming 50 percent of the broadcast week. *See Order* ¶ 69. This Commission's rules *require* digital signals to begin duplicating analog signals by 50 percent of the broadcast week by April 1, 2003. *See* 47 C.F.R. § 73.624(f)(i).

carry requirement would likely be home-shopping and other fringe stations — stations that the majority of cable viewers find less attractive than the programming services that they might replace.

TWC believes that the most important bottleneck in the transition is the large price differential between analog and digital sets.[21] The success of the transition to digital television will likely depend on consumers' willingness to invest in new hardware — not on digital must-carry rules. To date, most people have apparently concluded that the digital quality improvement is simply not worth paying thousands of dollars extra. As technology advances, as disposable incomes continue to grow, and as growing output allows for economies of scale, the price disparity may diminish to the point where most people are willing to pay it. But it is both impossible and pointless to try to predict with precision when this will happen.

What *is* certain is that consumers will be hurt if they are forced to embrace digital broadcasting before they are ready to do so. For that reason, TWC believes that the Commission should, as Chairman Powell has suggested, "prefer[] a transition schedule driven by the market, not regulators." George Leopold, *FCC Chairman Hints at Digital-TV Schedule Slip*, EE Times, Apr. 24, 2001 (quoting Chairman Powell), *available at* http://www.eetimes.com/story/industry/systems_and_software_news/OEG20010424S0061; *see*

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[21]Although prices for digital TV sets are dropping, they are still considerably higher than prices for analog sets. "One manufacturer recently announced that its fully integrated 61" HDTV set dropped from almost $8,000 two years ago to $3,999. For its smaller 38" integrated set, the price is $2,999. A 32" HDTV monitor is available for $1,599." Roy Stewart, Chief, Mass Media Bureau, *Digital Television Transition*, Presentation to the FCC, at 6 (Apr. 19, 2001). Meanwhile, equal-sized analog sets are available for a small fraction of those prices.

also CableFAX (Apr. 6, 2001) ("'The vast majority of Americans own multiple TV sets. It's a pretty big change for a family to make that swap.'") (quoting Chairman Powell).

IV. PROGRAM-RELATED DIGITAL MATERIAL IS NOT ENTITLED TO CARRIAGE AT ALL.

In the *Order*, the Commission determined that Section 614(b)(3)(A) requires carriage of "program-related material" in a must-carry-eligible digital signal. *Order* ¶ 57. The Commission sought further comment "on the proper scope of program-related material in the digital context." *Id.* ¶ 122.

As TWC explained in its petition for reconsideration of the *Order*, however, the Commission erred in requiring carriage of *any* "program-related material" that is not part of the primary video transmission of a digital signal. *See* Time Warner Cable's Petition for Reconsideration at 3, CS Docket No. 98-120 (FCC filed Apr. 25, 2001). The *only* program-related material that Section 614(b)(3)(A) requires to be carried is that "in the vertical blanking interval," which exists only in analog signals. 47 U.S.C. § 534(b)(3)(A). Although the Commission acknowledged that "there is no VBI in a digital signal," *Order* ¶ 60, it apparently believed that it has authority to adapt statutory analog must-carry provisions to the digital context, as suggested by broadcasters in this proceeding.[22]

The Commission, however, is not free to disregard clear statutory limitations on must-carry obligations. Section 614(b)(4)(B) merely instructs the Commission to "ensure cable

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[22]The Commission presumably would rely on Section 614(b)(4)(B): broadcasters have relied on that provision for the proposition that the Commission has authority to disregard statutory limitations on must-carry obligations. *See, e.g.*, MSTV/NAB/ALTV Opposition to Petitions for Reconsideration at 5-6, CS Docket No. 98-120 (FCC filed May 25, 2001).

carriage of . . . broadcast signals of local commercial television stations which have been changed to conform with . . . modified standards." 47 U.S.C. § 534(b)(4)(B). It does not imply authority to override explicit statutory limitations — particularly given applicable First Amendment concerns and Section 624(f)(1). As the Commission has recognized, the 1992 Cable Act grants it "minimal discretion in implementing the general must-carry obligation provisions." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 27 (1993).

Moreover, any reading under which non-primary video material in digital signals is required to be carried would be inconsistent with the Commission's reading of the term "primary video." As the Commission correctly determined, only one digital multicast signal can qualify as a station's "primary video." *See Order* ¶ 57. To interpret "program-related" as ushering non-primary video into the must-carry stream would hollow out that ruling: it might mean that, as a practical matter, non-primary multicast video streams (such as streams showing the same sports event from a different camera angle) would have to be carried after all. In sum, the Commission should reconsider its view that material outside the primary video transmission is entitled to carriage under any circumstances.

If, however, the Commission determines that it has authority to disregard the plain language of Section 614(b)(3)(A) and hold that "program-related material" in digital signals is entitled to carriage, it should read the term "program-related" narrowly. A broad reading would be flatly inconsistent with the scope of that term in the analog context. In contrast to possibly program-related multicast streams, which may consume five times as much bandwidth

as the primary video transmission in a digital signal, the VBI consumes only a tiny fraction of the bandwidth of the primary video transmission in an analog signal.[23] Allowing a VBI acorn to sprout into a multicasting oak goes well beyond adaptation, and thus would contravene even a supposed power to "adapt" Section 614(b)(3)(A) for the digital world. *Cf. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994).

Instead, the Commission should hold program-related only the material listed in the *Order*: "closed captioning information, program ratings data for use in conjunction with the V-chip functions of receivers, Source Identification Codes ("SID Codes") used by Nielsen Media Research in the preparation of program ratings, and the channel mapping and tuning protocols that are part of PSIP." *Order* ¶ 61. Any broader interpretation would be well in excess of a supposed statutory power to adapt to the digital context program-related material carried in the VBI of an analog signal.

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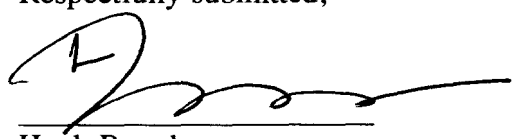
[23] *Compare Order* ¶ 47 ("Only a relatively minor amount of communications capacity is available apart from [analog] program transmission.") *with id.* ¶ 48 ("[I]n addition to being able to broadcast one, and under some circumstances two, high definition digital television programs, the [DTV] standard allows for multiple streams, or 'multicasting,' of standard definition digital television programming.").

CONCLUSION

For the reasons set forth above, the Commission may not and should not require cable operators to carry digital signals during the transition period.

Respectfully submitted,



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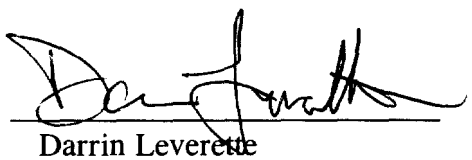

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